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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1250

VELSICOL CHEMICAL CORPORATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF THE PETITION AND MEMORANDUM FOR MANUFACTURING CHEMISTS ASSOCIATION AS *AMICUS CURIAE*

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MOTION OF MANUFACTURING CHEMISTS ASSOCIATION FOR LEAVE TO FILE MEMORANDUM IN SUPPORT OF THE PETITION AS *AMICUS CURIAE*

The Manufacturing Chemists Association (MCA) respectfully moves for leave to file the attached memorandum as *amicus curiae* in support of the petition for a writ of certiorari in the above-entitled case. Consents have been received from the petitioner, the Solicitor General, and all other parties except for the Environmental Defense Fund which has refused its consent.

MCA is a voluntary, non-profit membership association of 201 chemical companies in the United States and

Canada representing over 90 percent of the production capacity of basic industrial chemicals within those countries. MCA has often represented the interests of its member companies in legislative, regulatory and judicial matters. The petitioner in this case, Velsicol, is a member of MCA.

The questions presented by Velsicol's petition—proper allocation of the "burden of proof" under former § 7(c) of the Administrative Procedure Act (5 U.S.C. § 556(d)), and whether § 6(c) of the Federal Insecticide, Fungicide, and Rodenticide Act places the "burden of proof" on a party opposing a suspension order issued pursuant to that Act—are important to the chemical industry, both in the context of pesticide regulation and generally. Many of MCA's members, like the petitioner, are engaged in the manufacture and formulation of pesticides. Moreover, the first question presented is not limited in impact to pesticide regulation alone; it is central to government oversight of various operations and products of the chemical industry, one of the most closely regulated in the United States. As more fully discussed in the attached memorandum, this question of the allocation of burden of proof under 5 U.S.C. § 556(d) of the Administrative Procedure Act is involved in proceedings affecting the chemical industry under numerous statutes. Accordingly, MCA wishes to submit its memorandum to cover an aspect of the question that is not fully treated in Velsicol's petition: the importance of the interpretation given 5 U.S.C. § 556(d) to federal administrative law in general and the regulation of the chemical industry in particular.

Accordingly, MCA respectfully requests that this Court grant leave to file the attached memorandum *amicus curiae*.

Respectfully submitted,

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MEMORANDUM FOR MANUFACTURING CHEMISTS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Interest of the Manufacturing Chemists Association

The interest of the Manufacturing Chemists Association (MCA) is set forth in the foregoing motion for leave to file this memorandum in support of the petition for certiorari.

Briefly, the questions presented by the petition—particularly the allocation of the "burden of proof" under

former § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d)—are important to the chemical industry as a whole. Many of MCA's members, like the petitioner, are engaged in the manufacture and formulation of pesticides, but the issue is not limited to pesticide regulation. In addition, as outlined in greater detail below, the allocation of burden of proof under 5 U.S.C. § 556(d) has significant implications for proceedings under a variety of other statutes pervasively affecting the operations and products of chemical manufacturers. Accordingly, whether or not the decision of the lower court is reversed or upheld, in MCA's view it is important to have the issue definitively decided now by this Court.

Reason for Granting the Writ

The holding below—which places the "burden of persuasion" on a party challenging an agency's orders, despite express language in the Administrative Procedure Act, 5 U.S.C. § 556(d) that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof,"—raises an important question of federal law which has not been, but should be, settled by this Court.

It would be difficult to over-estimate the importance of federal administrative law and procedure to the functioning of our society. The passing of a quarter century has confirmed the accuracy of Mr. Justice Jackson's statement for this Court that "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." [1] This trend continues to accelerate.

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[1] *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487 (1952).

"The average person," Professor Davis has noted, "is much more directly and much more frequently affected by the administrative process than by the judicial process." [2] This is reflected in the volume of administrative activity; as long ago as 1963, the number of civil trials in all federal courts totalled approximately 7,000,[3] but the number of cases disposed of by federal agencies after "an oral hearing with a verbatim transcript" exceeded 80,000.[4] Today, nearly a score of independent federal agencies and dozens of bureaus and administrations within the Federal Executive Departments engage in administrative rulemaking and adjudication. The interests affected by their rules, orders and decisions affect every facet of American life from the grant of veterans' benefits to the grant of offshore oil leases.

If administrative law and proceedings are vital to the nation's governance, the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, is an integral element of the federal administrative scheme.[5] There are literally hundreds of references in the United States Code to the APA; many statutes explicitly incorporate it in whole or in part.[6]

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[2] Davis, *Administrative Law Treatise* 7 (1958).

[3] Ann. Rep. Office of U.S. Courts, 136 (1963).

[4] Committee Print, Subcommittee on Administrative Practice & Procedure, Senate Committee on the Judiciary, 88th Cong., 2d Sess., Statistical Data Related To Administrative Proceedings, August 1964, p. 82.

[5] ". . . The outstanding single development in administrative law and in the administrative agencies of the last half-century, unquestionably, is the genesis and enactment of the Administrative Procedure Act." Williams, "Fifty Years of the Law of the Federal Administrative Agencies—and Beyond," 29 Fed. Bar J. 267, 268 (1970).

[6] *See, e.g.*, 15 U.S.C. § 766; 19 U.S.C. § 1337; 42 U.S.C. § 6212; 21 U.S.C. § 811; 29 U.S.C. § 628; 49 U.S.C. § 1672.

The questions presented by this case, of course, do not concern the entire APA. Rather, they focus upon the appropriate interpretation of one section of that statute —5 U.S.C. § 556(d), allocating the burden of proof in formal hearings required by 5 U.S.C. §§ 553 or 554. These formal hearing sections of the APA are vital and widely-used provisions; there are more than 30 explicit references in the United States Code to 5 U.S.C. § 554 alone. Moreover, APA formal hearing procedures apply to all rules and adjudications which are required by statute to be made "on the record after opportunity for an agency hearing . . . ." [7] Initial examination has turned up nearly 200 references in the United States Code to determinations on the record after opportunity for an agency hearing which may thus be subject to the "burden of proof" provisions of 5 U.S.C. § 556(d).[8] The following statutes are but a few of those many references which significantly impact MCA's members, and are thus potentially subject to the formal hearing "burden of proof" provisions of the APA:

The Consumer Product Safety Act, 15 U.S.C. § 2064(f);

The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 346a(1), 348(f), 357(f), and 371(e)(3);

The Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 824(c), 875(b);

The Occupational Safety and Health Act, 29 U.S.C. § 659(c);

[7] 5 U.S.C. §§ 553(c), 554(a).

[8] Nor is the applicability of 5 U.S.C. § 556(d) limited to those federal statutes which implicitly or explicitly invoke it. This Court has held that the formal hearing provisions of the APA govern some federal administrative proceedings authorized by statutes which do not require that determination be made on the record after opportunity for an agency hearing. *Yong Yang Sung* v. *McGrath*, 339 U.S. 33, 50 (1950).

The Federal Water Pollution Control Act, 33 U.S.C. §§ 1320(c), 1342; and

The Toxic Substances Control Act, 15 U.S.C. § 2615(a).

These statutes are all of relatively recent origin, and they pervasively affect the operations and products of the chemical industry.[9]

The portion of 5 U.S.C. § 556(d) directing that "except as otherwise provided by statute, the proponent of a rule or order has the burden of proof," is a significant part of the federal administrative scheme and of the foregoing statutes. Wigmore stresses "the vital importance of the burden of proof . . ." [10] In administrative proceedings deciding close and very technical questions of economics, science, health and safety, such as those made under statutes regulating the chemical industry such as the Federal Insecticide, Fungicide, and Rodenticide Act involved in this case, and the other statutes cited above, the allocation of the "risk of non-persuasion" or "burden of persuasion" can be influential in determining the outcome of the proceeding.

Many regulations implementing the formal hearing provisions of the APA follow the plain language of the statute in allocating burden of proof. As a result of the decision below, however, it is to be expected that other agencies will follow the EPA's example and will shift the burden of proof or persuasion to parties opposing agency action in order to lessen the burden on themselves and the risk that their decisions or orders will not stand. The consequences of such a shift are serious and should

[9] The oldest of these statutes is the Federal Food, Drug, and Cosmetic Act. Its food additive section (§ 409, 21 U.S.C. § 348), which requires a showing of safety before chemicals are added to foods, was adopted in 1958. The most recent is the Toxic Substances Control Act adopted last year.

[10] 9 *Wigmore on Evidence* § 2483 at 267 (3d ed. 1940).

not be permitted without prior consideration of the matter by this Court.[11]

In short, the question presented in this case is an important one which should be decided by this Court. The issue is not only one of "importance in the administration of" the statute involved in this case.[12] It is also important to the administration of many other statutes, for large amounts of money and the fate of many applications, programs and products can turn on the proper interpretation of the burden of proof provisions of 5 U.S.C. § 556(d).[13]

Conclusion

For the reason stated here and in the petition, we respectfully submit that Velsicol's petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] As more and more authority continues to be delegated to administrative and regulatory agencies with greater and greater power over all elements of the public weal, it is vital that the power delegated be exercised in accordance with the intent and command of Congress. The accountability of regulatory agencies to the public which they were created to serve is attenuated at best. To the extent that agencies are permitted to distort or ignore legislation limiting their power, even this accountability is lost.

[12] *See, e.g., United States* v. *Ruzicka*, 329 U.S. 287, 288 (1946).

[13] *See, e.g., United States* v. *Zazove*, 334 U.S. 602, 613-14 n.17 (1948).